

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DYLLAN C. for ROBERT C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

CASE NO. 3:24-cv-05000-GJL

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13. See also Consent to Proceed Before a United States Magistrate Judge, Dkt. 3. This matter has been fully briefed. *See* Dkts. 7, 9, 10.

After considering and reviewing the record, the Court concludes the Administrative Law Judge (ALJ) did not err in finding Plaintiff not disabled. The Court accordingly **AFFIRMS** the Commissioner's final decision in this matter.

**I. PROCEDURAL HISTORY**

Dyllan C., survivor of Robert C. (Plaintiff), filed this action on behalf of Plaintiff pursuant to 42 U.S.C. § 405(g) for judicial review of Defendant's denial of Plaintiff's application

1 for Disability Insurance Benefits (DIB). Plaintiff's application for DIB was denied initially and  
2 upon reconsideration. *See* Administrative Record (AR) 131–33, 143. Plaintiff subsequently died,  
3 and Dyllan C. was substituted as the party in this action. AR 218. The ALJ held a hearing in this  
4 matter on December 20, 2022. AR 48–76. On February 17, 2023, the ALJ issued a written  
5 decision finding Plaintiff not disabled prior to his date last insured of June 30, 2021. AR 14–47.

6 Plaintiff also applied for Supplemental Security Income (SSI) benefits. AR 275–81. The  
7 ALJ found Plaintiff disabled beginning on his 55th birthday, several months after his date last  
8 insured. AR 35. However, as Plaintiff concedes (Dkt. 1 at 2; Dkt. 7 at 2), Dyllan C. was not a  
9 qualified survivor for the purposes of Plaintiff's SSI application, *see* 20 C.F.R. § 416.542(b), and  
10 therefore the denial of Plaintiff's SSI application is not at issue in this case.

11 The Appeals Council denied Plaintiff's request for review, making the written decision  
12 by the ALJ the final agency action subject to judicial review. AR 1–6. Plaintiff filed a Complaint  
13 in this Court seeking judicial review of the ALJ's decision on January 2, 2024. Dkt. 1. Defendant  
14 filed the sealed AR in this matter on March 4, 2024. Dkt. 5.

## 15 II. BACKGROUND

16 Plaintiff was born in 1966. AR 189. He was 54 years old on December 1, 2020, his  
17 amended alleged disability onset date. AR 383. The ALJ found Plaintiff had, at a minimum, the  
18 following severe impairments: inflammatory bowel disease; cardiac dysrhythmia; coronary  
19 artery disease; hyperlipidemia; affective disorder; attention deficit hyperactivity disorder  
20 (ADHD); posttraumatic stress disorder (PTSD); and Heroin abuse. AR 20. However, the ALJ  
21 found Plaintiff was not disabled prior to his date last insured because he had the following  
22 residual functional capacity (RFC):

23 to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b), with the  
24 following additional limitations: able to understand, remember and carry out simple

1 work; no conveyor belt-paced production requirements; with standard work breaks  
2 provided; occasional, superficial interaction with the public, co-workers and supervisors;  
occasional, routine workplace changes; and ready access to a bathroom.

3 AR 23.

### 4 III. DISCUSSION

5 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
6 social security benefits if, and only if, the ALJ's findings are based on legal error or not  
7 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211,  
8 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

9 In his opening brief, Plaintiff raises the following issues: (1) whether the ALJ erred in  
10 failing to include absenteeism-related limitations in the RFC; (2) whether the ALJ provided  
11 adequate reasons for rejecting certain lay witness statements; and (3) whether the ALJ erred by  
12 failing to consider Plaintiff as a person of advanced age prior to his 55th birthday. Dkt. 7.

#### 13 A. Plaintiff's Absenteeism

14 Plaintiff argues the ALJ erred by failing to fully consider whether to include additional  
15 limitations in the RFC to address the Plaintiff's potential need for absences from work due to the  
16 frequency of his medical appointments. Dkt. 7 at 3–7. In support, Plaintiff points to evidence  
17 showing the high frequency of his medical appointments before, after, and during the relevant  
18 period between his alleged onset date and his date last insured. *See id.*

19 The “RFC is an assessment of an individual's ability to do sustained work-related  
20 physical and mental activities in a work setting on a regular and continuing basis.” SSR 96-8p.  
21 The RFC is “the most [a claimant] can still do despite [their] limitations.” 20 C.F.R. §  
22 404.1545(a)(1). “The RFC assessment considers only functional limitations and restrictions that  
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1 result from an individual's medically determinable impairment or combination of impairments,  
2 including the impact of any related symptoms.” SSR 96-8p.

3       Because the RFC is based on a claimant’s potential to work on “a regular and continuing  
4 basis,” a need to be absent from work due to medical appointments related to a claimant’s  
5 impairments might present a potential limitation to be considered in formulating the RFC. *See*  
6 SSR 96-8p (“A ‘regular and continuing basis’ means 8 hours a day, for 5 days a week, or an  
7 equivalent work schedule.”). However, because the RFC reflects “*the most* [a claimant] can still  
8 do,” 20 C.F.R. § 404.1545(a)(1) (emphasis added), frequent medical appointments will not  
9 justify absenteeism limitations unless the appointments are necessary; and unavoidably result in  
10 work absences. *See Curtis v. Kijakazi*, 2023 WL 3918687 at \*2 (9th Cir. 2023) (unpublished)  
11 (“Fatal to her challenge here, Curtis did not present evidence that her monthly appointments  
12 would preclude her from working on a regular and continuing basis.”); *Goodman v. Berryhill*,  
13 2017 WL 4265685 at \*2–\*3 (W.D. Wa. Sept. 25, 2017) (“[T]o be disabling, the frequency of  
14 medical treatment must be necessitated by the medical condition and be substantiated by the  
15 evidence.”); *see also id.* at \*3 (“Accepting [that any medical appointment can result in a  
16 limitation in the RFC] would presume disability for anyone who frequently visited a doctor  
17 regardless of the necessity of the treatment or the medical prognosis.”).

18       The ALJ is only required to discuss evidence that would reasonably demonstrate that  
19 such necessary, unavoidable work absences would occur. Although the ALJ must consider  
20 evidence of the frequency of treatment and disruption to routine caused by treatment, *see* SSR  
21 96-8p, “an ALJ ‘need not discuss *all* evidence presented to her. Rather, she must explain why  
22 significant probative evidence has been rejected.’” *Kilpatrick v. Kijakazi*, 35 F.4th 1187, 1193  
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1 (9th Cir. 2022) (quoting *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1394–95 (9th Cir.  
2 1984)).

3 Most of the evidence of medical appointments Plaintiff identifies is neither significant  
4 nor probative. Plaintiff points to evidence he attended scheduled medical appointments with  
5 providers at home, by telephone, and at medical offices. *See* Dkt. 7 at 3–5 (citing AR 1225–26,  
6 1236, 1243–44, 2097, 2327, 2610). This is not significant and probative evidence, as such  
7 predictable, scheduled appointments, often of short duration, do not necessarily require  
8 unavoidable work absences. *See Goodman*, 2017 WL 4265685 at \*3 (“Nothing suggests that Mr.  
9 Goodman could not have scheduled his medical appointments outside of working hours . . .”).

10 Plaintiff also points to evidence he was hospitalized for several days twice during the  
11 relevant period—once for a colostomy in response to his inflammatory bowel disease symptoms  
12 (AR 1284) and once for a permanent pacemaker insertion (*see* AR 2114–16). Dkt. 7 at 3–5. This  
13 evidence is also not significant and probative, as it involves only one-time medical procedures  
14 unlikely to be repeated. A limitation unlikely to recur over a 12-month period is not included in  
15 the RFC. *See* SSR 23-1p (“Because of the duration requirement, we will not include limitations  
16 in the RFC assessment that completely resolve, or that we expect to completely resolve, within  
17 12 months.”). For the same reason, evidence of Plaintiff’s medical appointments and emergency  
18 care for side effects of his colostomy (e.g., rectal bleeding, AR 1227, 2044 and ostomy care, AR  
19 1225–26) is not significant and probative, as Plaintiff’s colostomy was subsequently reversed  
20 (*see* AR 2959).

21 Finally, Plaintiff points to medical appointments where he received emergency treatment  
22 for conditions related to his impairments during the relevant period. Dkt. 7 at 3–5 (citing AR  
23 2029, 2112, 2154, 2277). This evidence may be significant and probative, but the ALJ  
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1 adequately addressed much of Plaintiff's emergency treatment as well as the underlying  
2 symptoms which caused Plaintiff to receive such treatment. *See* AR 26–28. In particular, the ALJ  
3 found Plaintiff's conditions were managed effectively through treatment and that Plaintiff had  
4 been non-compliant with that treatment for much of the assessed period. *See id.* This is a valid  
5 basis on which to reject further limitations. *See Warre v. Comm'r*, 439 F.3d 1001, 1006 (9th Cir.  
6 2006) (symptoms that can be controlled “are not disabling”); 20 C.F.R. § 404.1530(a) (“In order  
7 to get benefits, you must follow treatment prescribed by your medical source(s) if this treatment  
8 is expected to restore your ability to work.”).

9       This finding was supported by substantial evidence and, contrary to Plaintiff's assertion  
10 (Dkt. 10 at 5), did pertain to the relevant time period. Some of Plaintiff's emergency treatment in  
11 April and May 2021 was due to symptoms of abdominal pain resulting from his inflammatory  
12 bowel disease and ulcerative colitis. *See* AR 2029, 2277. The ALJ noted, with respect to  
13 Plaintiff's gastrointestinal symptoms, that Plaintiff had “stopped his medication without  
14 consulting a doctor” and that between May 2021 and October 2021 “the record otherwise  
15 suggest[ed] stability with his gastrointestinal condition.” AR 28 (citing AR 3016 (“He elected to  
16 stop Humira on his own without consultation with any physician...[and]...[h]e decided to stop  
17 the Humira himself approximately 6-8 weeks ago.”)). Some of Plaintiff's emergency treatment  
18 was due to chest pain and sick sinus syndrome resulting from his cardiac impairments. *See* AR  
19 2112–14, 2154. But the ALJ noted Plaintiff's permanent pacemaker insertion in May 2021  
20 appeared to have resolved his cardiac symptoms, as he reported his symptoms of  
21 lightheadedness, chest pain, shortness of breath, and nausea resolved in June 2021 and did not  
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1 have increased cardiac symptoms until September 2021 when he stopped taking medications. *See*  
2 AR 27 (citing AR 1206, 2377).<sup>1</sup>

3 The ALJ therefore adequately addressed Plaintiff's emergency treatment by addressing  
4 the related symptomatic complaints, finding those complaints were resolved through treatment  
5 and that Plaintiff had not complied with treatment at some points during the relevant period.  
6 Plaintiff contends this is "an improper *post hoc* rationalization" for the ALJ's decision to not  
7 include an absenteeism limitation. Dkt. 10 at 5. But "[e]ven when an agency 'explains its  
8 decision with less than ideal clarity,' [the Court] must uphold it 'if the agency's path may  
9 reasonably be discerned.'" *Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (quoting  
10 *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 497 (2004)). As discussed, an  
11 absenteeism limitation is appropriate only if absences would be necessary because of a  
12 claimant's impairments. The ALJ explained why he did not include further limitations based on  
13 the impairments which resulted in Plaintiff's emergency treatment. He did not need to explicitly  
14 reject an absenteeism limitation for the Court to infer and review why such limitations were not  
15 included. *See Honcoop v. Barnhart*, 87 Fed. App'x 627, 629 (9th Cir. 2004) (unpublished)  
16 ("'Magic words' are not required of an ALJ.").

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20 <sup>1</sup> Plaintiff contends the ALJ's treatment noncompliance finding was curious because "if non-compliance was truly  
21 an issue, the ALJ would not have found [Plaintiff] disabled at all." Dkt. 10 at 5. But when an ALJ finds a claimant  
22 was noncompliant with prescribed treatment, that does not necessarily mean the claimant must be found not  
23 disabled. *See* SSR 18-3p ("We will find the individual is disabled if we determine that the individual would remain  
24 unable to engage in SGA, even if the individual had followed the prescribed treatment."). Instead, the ALJ assesses  
the RFC based on what a claimant would be capable of had they followed prescribed treatment. *See id.* ("We will  
determine what the individual's residual functional capacity (RFC) would be had he or she followed the prescribed  
treatment. We will then use that RFC to reevaluate steps 4 and 5 of the sequential evaluation process . . ."). Given  
that the assessed RFC compelled different disability findings under the two age categories Plaintiff possessed during  
the time period assessed by the ALJ, it is plausible that the ALJ would find Plaintiff not disabled for only some of  
that period despite Plaintiff's treatment noncompliance.

**B. Lay Witness Testimony**

Plaintiff contends the ALJ failed to provide “germane reasons” for rejecting the statements of his mother and son (Dkt. 7 at 7), as the ALJ is required to do when rejecting lay witness testimony. *See Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *Jerald H. v. Comm’r of Soc. Sec.*, 2023 WL 6533477, at \*3–\*4 (W.D. Wa. Oct. 6, 2023) (concluding “germane reasons” standard applies under new regulations for assessing medical opinion evidence). Plaintiff’s mother submitted a statement in December 2022 (AR 379–80) and Plaintiff’s son testified at the hearing before the ALJ (AR 58–67). Both explained that Plaintiff’s activity and energy worsened in 2018 and that he often complained of stomach issues, fatigue, and chest pain. *See id.*

The ALJ rejected these statements because they were inconsistent with medical evidence showing Plaintiff’s physical conditions “were largely medically manageable but [Plaintiff] was noncompliant.” AR 34–35. This was a valid basis for rejecting these statements. *See Lewis*, 236 F.3d at 511 (“One reason for which an ALJ may discount lay testimony is that it conflicts with medical evidence.”); *Warre*, 439 F.3d at 1006; 20 C.F.R. § 404.1530(a).

Plaintiff does not dispute that his physical conditions were “largely manageable” or that he had periods of treatment noncompliance. *See* Dkt. 7 at 10. Rather, Plaintiff contends that this finding was not supported by substantial evidence because most of the evidence of Plaintiff’s treatment noncompliance occurred outside the relevant period. *Id.*

However, as discussed in the previous section, the ALJ made adequate findings related to the effectiveness of treatment and Plaintiff’s noncompliance which were supported by substantial evidence, and which did pertain to the relevant period. *See* AR 26–28. For instance, the ALJ found Plaintiff had stopped taking medication for his gastrointestinal issues even though this medication was effective in managing his symptoms. The ALJ also determined that Plaintiff’s

1 permanent pacemaker insertion, along with his medications, were effective in managing his  
2 cardiac impairments. *See id.*

3 Because the ALJ rejected the lay witness testimony on a valid basis on which to disregard  
4 the lay witness statements, the Court need not consider the remaining reasons proffered by the  
5 ALJ because any such error would necessarily be harmless. *See Molina*, 674 F.3d at 1111–14.

### 6 **C. Age Categories**

7 Several months after his date last insured, Plaintiff turned 55. *See* AR 37, 189. In turn,  
8 Plaintiff’s age category—for the purposes of applying the medical-vocational guidelines—  
9 changed from being a “person closely approaching advanced age” to a “person of advanced age.”  
10 20 C.F.R. § 404.1563(d)–(e). When a claimant is “within a few days to a few months of reaching  
11 an older age category,” the ALJ must “consider whether to use the older age category.” 20  
12 C.F.R. § 404.1563(b). The decision to use an older age category, however, is discretionary. *See*  
13 *Lockwood v. Comm’r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010).

14 Relying on this provision, Plaintiff contends the ALJ failed to consider whether he was  
15 an individual of “advanced age” prior to his date last insured, given that he would reach that age  
16 category within several months. Dkt. 7 at 12–15.

17 The Ninth Circuit considered a similar situation in *Lockwood*, 616 F.3d at 1071–72. The  
18 Court found an ALJ “satisfied the requirement that she *consider* whether to use the older age  
19 category” by making it clear she was “aware that [the claimant] was just shy of her 55th  
20 birthday” and citing to the provision “which prohibited her from applying the age categories  
21 mechanically,” showing she “knew she had discretion” to use the older age category. *Id.* at  
22 1071–72 (emphasis in original).

1 Similarly, here, the ALJ was aware Plaintiff's date last insured was within several months  
2 of his 55th birthday, as he correctly identified the date Plaintiff turned 55. *See* AR 35. He also  
3 cited the provision prohibiting mechanical application of the age categories. *See id.* (citing 20  
4 C.F.R. § 404.1463). Thus, the Court is satisfied that the ALJ considered whether to exercise his  
5 discretion in applying a higher age category.

#### 6 IV. CONCLUSION

7 Based on these reasons and the relevant record, the Court **ORDERS** that this matter be  
8 **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g).

9 Dated this 18th day of July, 2024.

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12 Grady J. Leupold  
13 United States Magistrate Judge  
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